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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-893

IRVING SULMEYER and ARNOLD L. KUPETZ,
Co-Trustees in Bankruptcy for
Bubble-Up Corporation,
Petitioners,

vs.

THE COCA COLA COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

JOSEPH M. ALIOTO,
LAWRENCE J. APPEL,
LAW OFFICES OF JOSEPH L. ALIOTO,
One Eleven Sutter Street,
San Francisco, California 94104.

FRANK M. SWIFT,
GLOVER McGHEE,
CLAYTON H. FARNHAM,
SWIFT, CURRIE, McGHEE & HIERS,
Peachtree Center Building,
2000 Atlantic Gas & Light Tower,
Atlanta, Georgia 30303,
Attorneys for Appellants and Petitioners.

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I

GROUNDS FOR PETITION AND ARGUMENT

The various matters with respect to which Bubble Up respectfully petitions for a writ of certiorari are briefly commented upon with Argument *in seriatim:*

(1) The Appellate Court erred in stating that Bubble Up never mentioned vertical territorial restrictions in the

district court prior to its motion for judgment n.o.v. and in holding that Bubble Up's motion for a directed verdict on the issue of violation was not based upon vertical territorial restrictions;

(2) The Appellate Court erred in failing to rule at all on the proven horizontal territorial restrictions upon which, *inter alia,* Bubble Up's motion for a directed verdict was based.

Appendices A, B and C to the instant petition demonstrate beyond peradventure that the territorial restrictions and divisions of market were *continuously* argued to the district court as being unlawful *per se* and were specified by Bubble Up as a ground for its motion for a directed verdict on the question of violation. In fact, the district court requested and was supplied by the parties with full briefs[1] on the territorial restrictions and Bubble Up's theory with respect thereto *prior* to Bubble Up's motion for directed verdict.

Bubble Up's written statement of motion for a directed verdict[2] states in part:

> "It is respectfully submitted that this Court should direct a verdict in favor of the plaintiffs on the following liability issues: . . .
>
> 2. That the defendant contracted, combined, and conspired with bottlers of Coca-Cola to restrain the trade of competing lithiated lemon lime soft drink manufacturers to sell and distribute to and through

[1]Appendix A.

[2]See also the Statement of Facts forming a part of Appendix B to the instant petition.

> bottlers of Coca-Cola in violation of Section 1 of the Sherman Act (15 USCA § 1); . . .
>
> Many other acts, themselves unlawful, contributed to Coca-Cola's successful building of a monopoly of the distribution system of the bottlers of Coca-Cola. These are, inter alia, the territory restrictions. It is established that the territories were and are the product of the *bottlers,* not Coca-Cola, and therefore illegal *per se* under *White Motor Co. v. United States,* 9 L.Ed. 2nd 738 1963 and the cases cited therein . . ."

As observed by the district court, respondent failed to factually controvert the existence or nature of the territorial restrictions and division of markets.[3] The restrictions are themselves unlawful *per se,* as are the various combined marketing programs which were indisputably formulated and executed by respondent as a direct result thereof, *Continental Ore v. Union Carbide & Carbon Corp.,* 82 S.Ct. 1404 (1962).

The district court considered the horizontal and vertical territorial restrictions as having been properly specified as a ground for Bubble Up's motion for a directed verdict and rejected respondent's attempt to characterize said restrictions as lawful. The district court *failed to rule* at all on the said restrictions for reasons not available to it on Bubble Up's motion for directed verdict, i.e., the question of impact, a question never properly before or decided by the jury.

[3]Appendix A, p. iii. Bubble-Up respectfully suggests that there is no evidence even tending to support the Court's statement that "Bottler territories are a function of plant capacity, delivery truck range, . . . etc. [Opinion ftnt. 11].

Assuming *arguendo,* that Bubble Up had not mentioned "territorial restrictions" in its written statement of motion for a directed verdict, the district court was nevertheless fully aware of Bubble Up's position on said motion with respect to the horizontal and vertical territorial restrictions and division of markets and the requirements of F.R. Civ.P. Rule 50 were fully satisfied; *United States v. Fenix & Scisson, Inc.,* 360 F.2d 260 (10th Cir.) 1966; *certiorari denied,* 386 U.S. 1036, 87 S.Ct. 1474; *rehearing denied,* 388 U.S. 924, 87 S.Ct. 2096.

---

(3) The Appellate Court erred in failing to hold that the refusal by the district court to decide the questions of law raised on Bubble Up's motion for judgment n.o.v. constituted reversible error.

The district court refused to rule on certain claims made by Bubble Up that respondent had violated Sections 1 and 2 of the Sherman Act on the grounds that: the jury had found no *effect,* and Bubble Up had not voiced objection to certain jury instructions.[4] The refusal is clear error, and the Appellate Court's failure to so hold is itself error. *House of Koscot Development Corporation v. American Line Cosmetics Inc.,* 468 F.2d 64, 65 (5th Cir. 1972).

The Appellate Court states, in substance, that Bubble Up "argued" that the IMP had the *necessary effect* of ex-

[4]Appendix A, pp. iii, v. It must be again stressed that the question of "effect" or causation was never decided by the jury.

cluding Bubble Up through combinations. The record is that this exclusionary effect was not argued by Bubble Up, rather it was *directly admitted* by appellee, e.g.:

> "Q. And you knew, as a necessary effect, that if you were successful in having the Coca Cola bottlers take on Sprite who had Bubble Up, that the bottler would drop Bubble Up?
>
> A. [J. Lucian Smith, President of Coca Cola U.S.A.] Oh, yes."[5]

Bubble Up submits that, having established the plan, the invitation to participate therein and the direct restraint on Bubble Up's business as a necessary consequence thereof, the business "purpose" or excuse for respondent's use of the plan is irrelevant, *Northern Pacific, Railway Company v. United States,* 356 U.S. 4, 78 S.Ct. 514 at 518 (1958). *A fortiori* where the "business excuse" is the pre-existing horizontal and vertical territorial restrictions.[6]

---

(4) The Appellate Court erred in failing to hold that the 100% Last Ditch Program constituted a violation of Section 1 of the Sherman Act;

(5) The Appellate Court erred in failing to hold that the Equipment Lending Program [ELP] constituted a violation of Section 1 of the Sherman Act.

---

[5]TR. Vol. 4, p. 53. See: *Interstate Circuit v. United States,* 59 S.Ct. 468 (1939). In *United States v. General Motors Corp.,* 86 S.Ct. 1321, the Court stated;

> ". . . it has long been settled that *explicit agreement* is not a necessary part of a Sherman Act conspiracy . . ." *id.* 1329.

[6]TR. Vol. 14, p. 218.

(6) The Appellate Court erred in failing to hold that the 1964 Cash Bonus Program constituted a violation of Section 1 of the Sherman Act;

(7) The Appellate Court erred in failing to hold that the Interchange Programs constituted a violation of Section 1 of the Sherman Act.

Bubble Up submits that the Appellate Court failed to apprehend that *each* of these programs was *expressly conditioned* upon bottler combinations which same were necessitated by the unlawful territorial restrictions and are, thus, themselves unlawful *per se*.

---

(8) The Appellate Court erred in failing to hold that the payment of money by respondent's wholly owned bottling subsidiary to independent Coca Cola bottlers on the *express* condition that said bottlers *"drop* Bubble Up" constituted a violation of Section 1 of the Sherman Act.

---

(9) The opinion of the Appellate Court with respect to the district court's instruction on treble damages is in direct conflict with the opinion of the Fifth Circuit in *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240 1974; *cert. den.*, 95 S.Ct. 1427 (1975);

(10) The Appellate Court erred in failing to find that the argument of respondent with respect to the damages

claimed by Bubble Up constituted prejudicial error for which a new trial is required.

It is submitted that the district court did not merely instruct on trebling, nor did respondent inadvertently mention the fact of trebling. Respondent argued to the jury with great vehemence that:

> ". . . as soon as I began to talk in the *plaintiff's* terms about $6,000,000.00 here and $9,000,000.00 there and $25,000,000.00 there and $60,000,000.00 there, I somehow feel as though I have been edged over into a terri-[sic] in which I do not want to stand at all. *The evidence does not support a verdict* for the plaintiff."[7]

Of course petitioner never spoke in terms of $25,000,000.00 or $60,000,000.00, nor did the district court. This is the precise argument on *liability* that the Fifth Circuit ruled impermissible in *Pollock supra*. If it is error to instruct on trebling, it is error to argue trebling; *a fortiori* to argue the highest dollar amount which could *possibly* result from trebling; *a fortiori* to characterize the highest trebled amount as "plaintiff's terms"; *a fortiori* to argue against the return of a verdict on that basis.[8]

Respondent's argument left the jury with the notion that a verdict against appellee on violation could result in a damage award of up to $180,000,000.00. Avoidance of this clearly outrageous and severely prejudicial tactic is the whole rationale of the Fifth Circuit's opinion in *Pollock, supra.*

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[7]TR. Vol. 34 p. 115.

[8]In *Pollock, supra*, the Court stated:

> "The *justifiable* fear of anti-trust plaintiffs is that the juries will adjust the damage award downward *or find no liability*, therefore thwarting Congress's purpose . . . *id.* 1242.

II

CONCLUSION

For the foregoing reasons, Bubble Up requests that this writ be granted and the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Dated, San Francisco, California,
January 30, 1976.

Respectfully submitted,
JOSEPH M. ALIOTO,
LAWRENCE J. APPEL,
LAW OFFICES OF JOSEPH L. ALIOTO,

FRANK M. SWIFT,
GLOVER MCGHEE,
CLAYTON H. FARNHAM,
SWIFT, CURRIE, MCGHEE & HIERS,
By LAWRENCE J. APPEL,
Attorneys for Appellants
and Petitioners.

(Appendices Follow)

APPENDICES

Appendix A

PARTIAL CHRONOLOGY

On December 13, 1972, appellants [hereinafter "Bubble Up"] filed their Pre-Trial Statement pursuant to F.R.Civ. P. Rule 16 and therein stated, *inter alia:*

> "This is a private, treble damage action brought under Section 4 of the Clayton Act (15 U.S.C.A. 15) by an independent soft drink manufacturer alleging that it was injured in its business and property by reason of violations of Sections 1 and 2 of the Sherman Act (U.S.C.A. 1, 2) by the defendant the Coca Cola Company . . .
>
> Once having combined with the Coca Cola Company bottlers for all allied products, the defendant, in combination with the independents, [bottlers] combined to monopolize the entire soft drink industry. These endeavors *involved many combinations with the bottlers in restraint of trade; principally,* group boycotts, *stabilization of prices, divisions of markets,* and tie-in combinations."

On or about February 11, 1972, the District Court entered the final Pre-Trial Order which stated, *inter alia:*

> "STATEMENT OF CASE: This is an action under the Clayton Act, 15 U.S.C. §15, in which the plaintiff seeks to recover from the defendant damages alleged to have been sustained by the plaintiff resulting from the defendant's alleged violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, in the following particulars: (1) organizing meetings of independent Coca-Cola bottlers throughout the country with the specific purpose of boycotting the plaintiff's product and substituting the defendant's product, Sprite; (2) attempting to and destroying bottles in certain circumstances that were to be used for the production,

> distribution and sale of the plaintiff's product; (3) *organizing markets* throughout the country with the specific purpose of inducing and persuading independent Coca-Cola bottlers in specific areas to combine to boycott the plaintiff's product; (4) permitting the independent Coca-Cola bottlers to interchange vast amounts of advertising monies so as to persuade them to drop the plaintiff's product in favor of the defendant's product, Sprite; (5) paying for the entire introductory costs of advertising for the defendant's product with strategic Coca-Cola bottlers in an effort to initiate the group boycotts; (6) tying the independent Coca-Cola bottlers with each other in the common plan and program inviting group boycott of the plaintiff's product through the use of the exclusive Coca-Cola bottler magazine; (7) *tying the defendant's product, Sprite, directly to the defendant's product, Coca-Cola;* (8) selling Sprite at low predatory prices to independent Coca-Cola bottlers to drive out the plaintiff. Plaintiff further seeks injunctive relief against alleged future violations of the Sherman Antitrust Act."

On or about May 6, 1972, Bubble Up filed its motion for leave to file an amended and supplemental complaint and in connection therewith stated:

> "This lawsuit results from a successful effort by the defendant Coca-Cola to displace all non-Coca-Cola manufactured products which were bottled by independent Coca-Cola bottlers. One of the primary victims of the acts by the defendant Coca-Cola was the plaintiff Bubble Up. In order to maintain its share of the soft drink market and to eliminate competition for the non-cola market of the independent Coca-Cola bottlers, the Coca-Cola Company, beginning in 1960, began to manufacture non-cola products. These prod-

ucts were for the exclusive use of the independent Coca-Cola bottlers. The Coca-Cola Company, in its beginning stages, distributed non-Cola allied products to the independent Coca-Cola bottlers, relying heavily on the relationship between the independent Coca-Cola bottlers and the Coca-Cola Company. *This relationship consisted largely of the product Coca-Cola, illegal territorial agreements,* and exclusive services and products generated by the Coca-Cola Company for itself and the independent Coca-Cola bottlers."[1]

On June 5, 1972 jury trial commenced and, thereafter, substantial evidence directly establishing the *per se* unlawful vertical and horizontal territorial restrictions and divisions of markets between and among the Coca Cola bottlers and between appellee and the Coca Cola bottlers was admitted without objection.[2]

On June 12, 1972, appellee orally moved the district court to strike certain evidence respecting the unlawful vertical and horizontal territorial restrictions and divisions of markets.[3]

On June 12, 1972, the following testimony was taken from John P. Austin, chairman of the board of appellee,

[1]Bubble Up's motion was granted by the district court on May 31, 1972.

[2]e.g.: TR. Vol. 1, pp. 46, 47, 73, 91 [Opening Statement] 198-204; Vol. 4, pp. 164-171; Vol. 5, pp. 121-130; Vol. 6, pp. 85, 103, 111, 191, 194, 195, 226.

Appellee failed to object *at all* to the admission of Plaintiffs Exhibit 760, principally relied upon by Bubble Up in showing the origin and nature of the *per se* unlawful vertical and horizontal territorial restrictions. TR. Vol. 19, p. 237. (Emphasis supplied).

[3]TR. Vol. 6, pp. 3-44.

and in connection therewith the following colloquy occured:

"Mr. Gowen: Your Honor please, we object to the testimony with respect to the territorial restrictions and move to strike it on the ground that it is not relevant and material to the issues in this case, and that the Court has heretofore specifically removed it from the realm of inquiry before this jury.

The Court: I don't know that territories in and of itself has been attacked as being a violation of the antitrust laws. As many things have been said in this case, the explanations are not dealing with the subject matter. I don't understand the materiality of it.

It's already in evidence. I don't know that it is harmful to be in or out at this point. If there's any contention to it, maybe we will find out; if not, I'll strike it.

Mr. Alioto: Well, also, Your Honor, counsel is incorrect in that Your Honor dropped it from the pretrial order. There is a specific statement with respect to specific underlying evidence. Your Honor did not require the plaintiffs to state the general allegations, although this was one of those—this was one of those general allegations.

The Court: Well, go ahead with your questioning.

Mr. Alioto: Yes, sir.

By Mr. Alioto:

Q. Now, for the introduction of Sprite you relied upon, did you not, the territorial, to some extent, the territorial restrictions between the bottlers?

A. Yes; that is correct.

Q. And you would fix the Sprite contract directly to the territory?

A. That is correct."[4]

[4]TR. Vol. 6, pp. 193-194.

On June 14, 1972, the following colloquies occurred between the district court and counsel for the parties in connection with appellee's motion to strike:

> Mr. Alioto: I just have one matter, Your Honor, and that would be, as we mentioned to the Court yesterday, we would like to simply orally rebut the Motion to Quash and the Motion to Strike by simply stating with respect to the Motions to Strike, which are in two areas, Your Honor, one on the fountain sales and one on the territories, the motion was made on the ground they were irrelevant.
>
> . . .
>
> With respect to the territories, again, we say that the defendant, if they had an objection, which we don't think they do, clearly waived it by not bringing it up at the time.
>
> And, further, Your Honor, that the territories are clearly relevant since these witnesses, including Mr. Austin, said they relied, in whole or in part, upon the territorial arrangements for the introduction of Sprite, and the evidence has shown that they used the territory to curtail sales of Bubble Up in a number of ways, one of which being that when one neighbor didn't have Bubble Up the other neighbor could not sell in his region, sell Bubble Up in his region. But, more importantly, that this was the founding corporation [sic] among the bottlers which set forth the intricate plan called the Investment Market Program and later the consolidated or what are called these production centers, the idea that Mr. Harvey told us about yesterday.
>
> . . .
>
> The Court: Well, the territorial thing maybe raises another question. The only issue—the only testimony I have heard—most of the testimony I have

> heard about territorial arrangements had to do with advertising.
>
> . . .
>
> Mr. Gowen: . . . The territorial restrictions are different from the merger issue. The territorial—the objection to the territorial evidence is to the competitive *effect* of territorial restrictions under which The Coca-Cola Company allocated certain territory to a bottler. We do not think that is relevant, and this is one of the——
>
> The Court: It seems to me there is no issue, there is really no issue in this case that Coca-Cola has allocated territories.
>
> Mr. Gowen: No, sir; *no issue about that.* We simply think it is not relevant to this particular case.
>
> The Court: Obviously, if it were a per se antitrust violation to allocate territory to Sprite, it would be a per se violation for Coca-Cola to do it for the production Coca-Cola.
>
> Mr. Alioto: It is, Your Honor, a per se violation. It is a per se violation in what they are doing with Coca-Cola, and it is a per se violation for Sprite.
>
> The Court: Well, I haven't ready any decisions that say allocation of territory, to a dealer in a commodity, is a per se violation of the antitrust laws.
>
> Mr. Alioto: I would direct two cases to Your Honor on that. One is the Supreme Court case in Sealy.
>
> The Court: What?
>
> Mr. Alioto: Sealy, S-e-a-l-y.
>
> The Court: Give the citations.
>
> Mr. Alioto: United States against Sealy. I can give the cite to the Clerk.
>
> The Court: Give it to Mr. Butters back there. He has a pad.
>
> Mr. Alioto: And a new one called Topco.

The Court: What are we doing in court if that is true?

Mr. Alioto: Well, this is one of the things, Your Honor. They also have company-owned operations which are subsidiaries, and, therefore, are in competition with their own bottlers. That not only makes it vertical, but it also makes it——

The Court: I thought the company-owned bottlers also had territorial allocations, too.

Mr. Alioto: They have their own territory, and they divide territory with neighboring independent bottlers. In other words, the company-owned territory, bottling plant, cannot distribute outside of its geographic territory either.

So it's not just a straight vertical, like an arrangement with the dealer; it's also horizontal among a number of competitors.

But also this foundation, *these violations* which are the foundation, were used and relied upon the way Mr. Austin said in the marketing of Sprite.

The Court: *Well, I say if it's a violation, either one, Sprite or Coca-Cola, it's a violation, period,* I'm wondering why we're in court. There's no issue but that they did that.

Mr. Alioto: We are saying—what—we are not *just* challenging that.

The Court: I am surprised you didn't—I am surprised, if it was a per se violation, why you didn't make a motion for summary judgment as to liability.

Mr. Alioto: Well, we fully intend to make such a motion, Your Honor, after the presentation of our evidence.

The Court: I want to see some authority on that.

Mr. Gowen: Yes, sir.

The Court: Because I think there are a lot of companies in this country in pretty bad shape, if that's true.

Mr. Alioto: That's absolutely correct, Your Honor.

But we, of course, are not the government. We *have to show our impact,* and, of course——

The Court: I realize that. I can see on a territorial restriction *coupled with other acts* could be a violation of the antitrust laws, and this is really how most of these private antitrust cases—I assume this is why you are making the effort you are making *to try to tie different acts in to show a violation.*

Mr. Alioto: Well, *ordinarily,* Your Honor, you have to *add up a number of acts* which might be legal in themselves, and you come out with something that is illegal. *In this particular case there are a number of acts that are per se illegal themselves.*

The Court: You have raised another very disturbing point. *I haven't concerned myself about a per se violation just because of territorial restrictions.* I will look at the cases, and if you would give me the citations I would appreciate it. . . .

The Court: *As I say, if it's a violation per se, that's a violation in and of itself, I'll have to go into it. I'll go into that."*[5]

On June 19, 1972, Bubble Up, pursuant to the direction of the district court, supplied the court with its letter brief on the unlawful vertical and horizontal territorial restrictions and division of markets in opposition to appellee's motion to strike and stated; *inter alia:*

> ". . . The defendant has, by way of oral motion made without citation to any authority and without benefit of any written brief or argument to which the plaintiff might respond, moved the Court that certain portions of the testimony of adverse witnesses called by the plaintiff for purposes of cross-examination be

[5]TR. Vol. 8, pp. 3-5; 170-176. (Emphasis supplied).

stricken from the record. Defendant appears to have based its motion on a general claim of irrelevancy. The plaintiff denies the existence of this ground or any ground for the exclusion of the evidence subject to defendant's motion to strike, and claims additionally that under the provisions of Rule 15(b) of the Federal Rules of Civil Procedure it is entitled to have this evidence remain in the record and introduce other evidence of like kind.

. . .

[A.]

One serious restraint placed by the defendant upon large portions of this distribution market of skilled bottlers which had an effect upon both the bottlers and Bubble Up was the territorial restrictions clause contained in the bottlers' contract with the defendant.

In 1959 and 1960, when the plaintiff made a concerted effort at entry into this bottler market it found that the geographical territory for which any single bottler of Coca Cola would undertake to bottle its product was determined *not* by the competitive contours of the retail or consumer market available to the bottler, (i.e. supermarket warehouses, etc.) *nor* by reference to the financial ability of a bottler to effectively compete, but by sole, complete and exclusive reference to that territory for which the bottler could bottle and sell Coca Cola. The plaintiff in most cases simply did not have the reasonable business opportunity to discuss or negotiate with the Coca Cola Bottlers concerning the nature and extent of the territory a specific bottler might be able to service with the product Bubble Up. The plaintiff's franchise agreements were arbitrarily made to conform to the territorial limitations set out in the bottler's Cola franchise, limitations strictly enforced by the defend-

ant (Richard Harvey). The defendant had actual knowledge of the fact that the territorial limitations set out in its Cola franchises had the effect of defining the area for which a bottler might bottle other products, either by contract (Bubble Up) or through "gentleman's agreements", (Exhibit 6). In those rare situations where a bottler flaunted the defendant's territorial restrictions and independently determined the geographic area for which he could bottle the plaintiff's product he was subjected to severe harrassment if he attempted to do so much as carry a case of Bubble Up across the "magic line" without changing out of his Coca Cola uniform or repainting his Coca Cola truck with full knowledge of the *practical* business effect such "legal" segregation would have on the bottler and his ability to continue with Bubble Up and the willingness of other Coca Cola Bottlers to take it on in the first instance.

. . .

The division of territories between otherwise competing bottlers is a subject which is sacred to the Coca Cola Company and the bottlers, and the defendant has continually promised the bottlers that it would not disturb this relationship between them. The defendant has honored and observed these exclusive territorial restrictions to its own monetary detriment with a resulting foreclosure from entrance into several major metropolitan markets for lemon/line including the tremendous Los Angeles market. (Footnote omitted).

In point of fact these arbitrary territorial restrictions were initiated *by the bottlers* at a time when the defendant had already achieved one hundred percent (100%) national distribution of fountain Coca Cola, and resulted in the "one stable product, one package

and one price" (5¢ everywhere) alluded to by Mr. Austin. These territories were never determined by the natural forces of competition. Even if the territorial restrictions in the contract were in their inception related to competition (which was not the case), that fact cannot be used to sanction these price-stabilizing contracts in today's market place; to the contrary, the fact that these contracts were granted in *perpetuity* is strong evidence that the bottlers and the company (through its company owned plants) consciously created a situation that could *not* adapt to market forces.

. . .

The defendant *admittedly* did not undertake, in 1961, when it introduced Sprite, to ascertain the amount of territory for which any particular bottler could profitably bottle and sell Sprite. Instead, it chose to continue to avoid product and price competition between bottlers by adhering to the 1890 Cola territorial restrictions.

The defendant, most incredibly, then went on, by initiating the investment market program, to *define geographically* the *actual* territory for which a bottler could bottle Sprite. Coca Cola thus kept the best of both worlds in introducing Sprite: in place of giving bottling rights to a bottler to service a geographic area which had been delineated by some reference to the competitive market place in which the bottler would do business (the area serviced by a supermarket warehouse or the geographical ambit of a given television signal), it kept the bottlers restricted to arbitrary marketing geographies and actually showed them how they could, *if* they handled only Coca Cola soft drink products, *combine* their efforts in the *actual* geographically relevant market and then went on to

create, in 1962, a separate corporate functionary (George Trippe, Plaintiff's Exhibit 518) for the purpose of demolishing through consolidation and merger, the arbitrary, price-stabilizing territories to which they had restricted the Sprite bottlers in the first instance!

B. *The Law*

The division of markets among competitors is illegal per se. *United States vs. Addyston Pipe and Steel Co.,* 85 F. 271, affirmed 20 S.Ct. 96 (1899). This is so even if the division of territory is between or among subsidiaries of the same corporation. *Timken Roller Bearing Company vs. United States,* 71 S.Ct. 971 (1951). To the extent that the Coca Cola Company operates bottling companies throughout the United States in competition with independent bottlers of Coca Cola, the division of market is *per se* unlawful.

It is also the law that the division of markets among wholesalers (bottlers) through vertical contracts with a supplier (Coca Cola) is per se unlawful.

The first case to meet this vertical question was *White Motor Company vs. United States,* 83 S.Ct. 696 (1963). In that case a divided court speaking through a majority of four and one concurring with three dissents, the Supreme Court held that vertical geographical restraints imposed by smaller companies in an effort to compete against larger companies *may,* in those circumstances, not be a *per se* violation. In *White Motor* the Supreme Court remanded the case for trial on the merits to determine if the vertical geographical restraints, even for a small company, may be saved by the claim of the small company that it needed such restraints to compete against the

larger companies. In the dissent by Mr. Justice Clark, together with the Chief Justice, and Justice Black, Justice Clark stated "I believe that these bare bones really lay bare one of the most brazen violations of the Sherman Act that I have experienced in a quarter of a century." The holding by the majority clearly limits such vertical geographic restrictions, at least until after trial, to a small company which may need such restrictions to break into or to stay in a business. The separate opinion of Mr. Justice Brennan concurs with the majority but only on the condition that the restriction was by the supplier and *not the product of the wholesalers* (bottlers). Both the majority and the concurring opinion agree that if the restrictions were simply "formally imposed by the manufacturer rather than through inter-dealer agreement" that such formality would not save such restrictions from the condemnation of the Sherman Act, citing *Interstate Circuit, Inc. v. United States,* 59 S.Ct. 46.

The next treatment of such vertical territorial restrictions by the Supreme Court was in *United States vs. Sealy,* 87 S.Ct. 1847 (1967). There the Court held that such restrictions were per se illegal in that the Court found that the substance of the restrictions rather than the form clearly showed them to be the product of the wholesalers (bottlers) and not the creation of the manufacturer (Coca Cola), even though each wholesaler had an individual contract with the manufacturer which set forth the territorial restrictions.

The next case to deal with the question was *United States vs. Arnold, Schwinn & Company,* 87 S.Ct. 1856 (1967). In that decision the Supreme Court held that vertical restraints as to territory among wholesalers

(bottlers) were a per se violation of the Sherman Act if the restrictions were used in whole or in part to eliminate *price* competition by the competing wholesalers (bottlers). It has already been testified to by one of the witnesses, Mr. Smith, that the territorial restrictions eliminated both price and product competition. But even that condition was recently removed by the Supreme Court.

On March 29, 1972, two months ago, the Supreme Court in *United States vs. Topco Associates,* 92 S.Ct. —1972, held that a cooperative known as Topco served as an intermediate wholesaler for a group of retail grocery stores. Topco procured and distributed to its members different products. Payment was made by the members either to Topco or directly to a manufacturer. The Court treated the relationship of Topco to its members as a horizontal arrangement, and therefore illegal *per se.* The basic arrangement made by each member with Topco was that Topco controlled brands would be sold only within the marketing territory allocated to a member and that the member would refrain from selling Topco controlled brands outside such marketing territory. The lower court, after trial on the merits, found the arrangement to be reasonable in that it permitted small retailers to compete against the large retail chain stores. The Supreme Court reversed, finding the arrangement to be illegal *per se.* Although the Court treated the arrangement as horizontal in substance, it cited the *White Motor* case and equated territorial limitations with the reasoning of the Supreme Court in *United States v. Trenton Potteries Co.,* 47 S.Ct. 377 (1927), that however reasonable a *per se* violation may appear today, economic and business changes make it the unreasonable practice tomorrow." [All emphasis in original].

• • •

On June 19, 1972, appellee filed its brief in support of it motion to strike and, thereafter, filed its "response to plaintiff's letter of June 19, 1972" on the question of the unlawful horizontal and vertical territorial restrictions and divisions of markets.

On June 22, 1972, the district court overruled appellee's motion to strike certain evidence respecting the unlawful vertical and horizontal territorial restrictions and division of markets.[6]

On June 26, 1972 the following colloquies occurred between the district court and counsel for the parties:

"Mr. Watson: Next to the last question beginning with:

"Mr. Koch, when you entered into the franchise agreements", we object to the remainder of that page and the top of page 146——

The Court: Down to where on 146?

Mr. Watson: Down to the word "generally", almost in the middle of the page.

The Court: Let me read it.

Mr. Watson: Do you want me to read this into the record as we go along?

Mr. Alioto: That's the way we have been doing it before.

Mr. Dowen: [sic] I don't think the record would be complete without it, then.

Mr. Watson: Question: "Mr. Koch, when you entered into the franchise agreements with Coca-Cola bottlers you attached to that agreement a description of the territory in which that bottler could sell or distribute Bubble Up?

Answer: "Correct."

[6]TR. Vol. 14, p. 43.

Question: "Is it true that geographical description was determined in most instances by the territorial outline in which that bottler could sell Coca-Cola Products?"

Answer: "That's right."

Question: "Would bottlers from time to time, would Coca-Cola bottlers from time to time insist that the Bubble Up franchise that you negotiated with them contain a territorial description which conformed to the Coca-Cola territorial description?"

Answer: "Yes."

Question: "Would they insist upon that as a condition that had to be satisfied prior to entering into an actual franchise with Bubble Up?"

Answer: "Generally."

We object to that on the same grounds that we have maintained our objection, that territorial boundaries in this case are not at all *related to the decision* on the part of the bottler to take Bubble Up on or not, or to take Sprite on or not. We regard it as irrelevant and immaterial to the issues as outlined in the pre-trial order.

The Court: Well, in view of my previous ruling, if that's the objection, I will overrule the objection."

• • •

On June 29, 1972, the following colloquoies occurred between the district court and counsel for the parties:

"Mr. Appel: That was page 12. That's all we have from the—let's see, 47 and 48 and 49 of the December, 1960, "Coca-Cola Bottler" which is an article by C. W. Seifert, president of the Coca-Cola Bottlers Association, which speaks about the need for cooperation, *cooperation on a regional and area basis,* and also talks about the *territorial question* that was coming up as a result of the chain store age, as it is called in the article itself.

"These main developments point up quite dramatically to my mind, at least, one vital factor I want to consider as a bottler of Coca-Cola—what I do today in my *territory* undoubtedly will affect my neighboring bottlers, and on the other hand, the policies my neighboring bottlers pursue will have a direct impact on my own operation."

This is right at the beginning when they began the investment market program, Your Honor.

Mr. Peterson: We object to it on the grounds it is irrelevant and immaterial.

The Court: I'll admit it.

Mr. Appel: We would offer pages 46 and 47 of the November, "Coca-Cola Bottler", Your Honor, which is a speech by Patrick O'Malley, vice-president of Coca-Cola, which states—I would like to get the exact language on this one, Your Honor. I have a quote from it here which states, "About the only things left that will be sacred and untouched are the *bottlers' own territorial lines.* Coca-Cola business should always be the heart of his business. Without Coca-Cola, the Coca-Cola Company is nothing; without Coca-Cola, the bottler of Coca-Cola is nothing."

Your Honor, this is the disintegration and threats to the territorial lines in the late 50's and early 60's.

The Court: What is the threat?

Mr. Appel: Your Honor, this relates to our contention that the Fanta Beverage Company, in issuing franchises, didn't undertake to reassess what *territory* a bottler might be able to actually bottle and sell products in, but, instead, chose to issue those franchises, contracts, *in strict conformance with Coca-Cola contracts.*

This is a promise made by the Coca-Cola Company to the bottlers that those lines will remain sacred, and now the only thing they have to do is combine, to get in marketing groups, to get together.

Mr. Peterson: Your Honor, the article doesn't say all of that.

We object to it on the ground that it is irrelevant and immaterial.

The Court: I like to have things . . . . I learned in law school that I couldn't accept that. Everybody is a little bit geared to their side of the case.

Tell me what it says in the article that you contend would, in any way, be relevant to the issues in this case. Quote it to me.

Mr. Appel: All right.

The Court: I don't mean quote the article.

Mr. Appel: Your Honor, they talk about a challenge in the market place. "To accomplish this demands first a frank appraisal of the facts, a clear definition of the major challenges that face us in the market place today."

Then, it has, "Editor's Note: Here Mr. O'Malley addressed the problems and potentials of the business." They are talking about a particular challenge here.

Then it does on and states—then it goes on to say, "*In this new drive* towards the potential of which our business is capable, about the only thing left that is *sacred and untouched are the bottler's own territorial lines.* We can speak like this because when the company and the bottlers meet in convention, they must talk to each other heart to heart with all the barriers down."

That is a direct quote, Your Honor.

Mr. Peterson: We again object to it on the ground it makes no mention of the product Sprite in any way, directly or indirectly.

The Court: I will go ahead and let it in.

The Clerk: Plaintiff's Exhibit 781.

Mr. Appel: We would offer pages 63 and 65 of the November '63—these have already been marked,

Your Honor, but let me—this particular speech by Charles W. Seifert is addressed to the bottlers. This is a man that was the president of the Coca-Cola Bottler Association and who has from time to time had a representative on the Coca-Cola's board. Let me give you some of the language.

"And when competition starts a fight, we will ask no quarter, we will give no quarter, and we will continue working together to retain our position of leadership. We cannot afford the slightest sort of peaceful co-existence. *We are after the commercial scalp of our competitors.* We may make an occasional mistake."

Your Honor, this is cooperation, the key to this kind of success.

The Court: Who is saying all of this?

Mr. Appel: This is the president of the Coca-Cola that is saying this.

Mr. Peterson: That is not right. It is Charles W. Seifert. He is a Coca-Cola bottler. He happens to be dead now, but he ran a bottling plant in New Hampshire. He is not an employee of the Coca-Cola Company, never has been.

Mr. Appel: This is *their* [the Coca Cola Company] publication. They sent it to us.

The Court: I will admit it.

• • •

Mr. Appel: Just a couple in this one, Your Honor. We have in '68 a few more.

Page 7 of the June, 1968, "Coca-Cola Bottler", Your Honor. This particular issue they are talking about contact with supermarkets. . . .

It goes on to say a team effort—this is a Coca-Cola company operating at a national level for the bottlers because the bottlers themselves, because of the *territorial restrictions*, can't approach and sell to supermarket warehouses. *This territorial restriction is one of the things that Mr. Ryan testified to today*

that had an impact on Bubble Up in trying to get Coca-Cola bottlers.

This is the way the Coca-Cola Company is dealing with it by going at the national account level through one spokesman, not each bottler going to the retail outlets, but having the Coca-Cola Company go to the national level and filtering it down to the bottlers in order to *avoid the territorial restriction.*"[7]

• • •

On June 30, 1972, Bubble Up orally moved the district court for a directed verdict on the ground, *inter alia,* that the uncontroverted evidence showed that appellee had violated Section 1 of the Sherman Act, [15 U.S.C. § 1]. On Saturday, July 1, 1972, Bubble Up, in accordance with its understanding of the direction of the district court, served upon the appellee and delivered to the district court a written statement of its motion for a directed verdict together with supporting authorities and a statement of the undisputed facts relied upon by Bubble Up in connection therewith. Said written statement is attached to the instant petition as Appendix B.

On July 3, 1972, appellee responded by letter to Bubble Up's written motion for a directed verdict.

On July 5, 1972, the district court "temporarily overruled" Bubble Up's motion for a directed verdict.[8]

On July 21, 1972, Bubble Up renewed its motion for a directed verdict on the ground, *inter alia,* that the uncontroverted evidence showed that appellee had violated Section 1 of the Sherman Act [15 U.S.C. § 1].[9] The said motion was overruled by the district court.[10]

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[7]TR. Vol. 19, pp. 241, 254-258, 269, 270. (Emphasis supplied).
[8]TR. Vol. 21, pp. 22, 23.
[9]TR. Vol. 33, pp. 56-71.
[10]TR. Vol. 33, p. 71.

Appendix B

OFFICES OF
SWIFT, CURRIE, McGHEE & HIERS
ATTORNEYS AT LAW
3000 SAB LIGHT TOWER
PEACHTREE CENTER
ATLANTA, GEORGIA 30303

PHONE
521-3340
AREA CODE 404

FRANK H. SWIFT
WARNER S. CURRIE
OLIVER McGHEE
JAMES B. HIERS, JR.
WILLIAM W. NORTON
CHARLES L. DREW
ALBERT E. PHILLIPS
W. WRAY ECHL
GEORGE W. HART
JAMES T. McDONALD, JR.
WALTER O. LAMBETH, JR.
CLAYTON H. FARNHAM
GUERRY R. MOORE
FREDERICK F. SAUNDERS, JR.
VICTOR A. CAVANAUGH
A. L. MULLINS, JR.
J. ALEXANDER PORTER

Honorable Albert J. Henderson, Jr.
Judge, United States District Court
Old Post Office Building
Atlanta, Georgia

RE: Irving Sulmeyer and Arnold L. Kupetz, Co-Trustees In Bankruptcy for Bubble Up Corporation, Civil Action No. 11856 in the United States District Court for the Northern District of Georgia

Dear Judge Henderson:

This letter sets out the basic authority of the plaintiffs in support of their motions (1) to direct a verdict on the issue of liability and (2) to exclude evidence which the defendant indicates it will offer.

I.
Directed Verdict

A short statement of the undisputed facts is attached to this letter as Exhibit A.

Although the Courts greatly disfavor the granting of summary judgments, directed verdicts, and judgments NOV against antitrust plaintiffs, Poller v. CBS, 82 S. Ct. 486 (1962), Norfolk Monument Co. v. Woodlawn Memorial Gardens, 89 S. Ct., 1391 (1969), Fortner Enterprises, Inc. v. United States Steel Corp., 89 S. Ct. 1257 (1969), Continental Ore v. Union Carbide and Carbon Corp., 82 S. Ct. 1404 (1962), Cornwell Quality Tools, Inc. v. C.T.S., 446 F.2d 825 (9th Cir. 1971), Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971) because "motive and intent play leading roles, the proof is largely in the hands of the co-conspirators, and hostile witnesses thicken the plot"; the converse is not true. The Courts will and do grant summary disposition of antitrust cases against defendants, Associated Press v. United States, 655 Ct. 1416 (1945), Simpson v. Union Oil Co., 84 S. Ct. 1051 (1964), United States v. Northern Pacific Ry. Co., 78 S. Ct. 514 (1958); affirm the exclusion of evidence of justification for group boycotts, Fashion Originators Guild v. FTC, 61 S. Ct. 703 (1941); and order the entry of judgments for antitrust plaintiffs even after defendants have received

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favorable jury verdicts, Albrecht v. Herald Co., 88 S. Ct. 869 (1968) or favorable Court tried decisions, United States v. Container Corp. of America, 89 S. Ct. 510 (1969).

It is respectfully submitted that this Court should direct a verdict in favor of the plaintiffs on the following liability issues:

1. That the defendant attempted to monopolize the sale and distribution of lithiated lemon lime soft drinks to and through the bottlers of Coca-Cola in violation of Section 2 of the Sherman Act (15 USCA § 2);

2. That the defendant contracted, combined, and conspired with bottlers of Coca-Cola to restrain the trade of competing lithiated lemon line soft drink manufacturers to sell and distribute to and through bottlers of Coca-Cola in violation of Section 1 of the Sherman Act (15 USCA § 1);

3. That the defendant contracted, combined, and conspired with bottlers of Coca-Cola to monopolize the sale and distribution of Lithiated lemon lime soft drinks to and through bottlers of Coca-Cola in violation of Section 2 of the Sherman Act (15 USCA § 2); and

4. That the defendant monopolized the sale and distribution of lithiated lemon lime soft drinks to and through bottlers of Coca-Cola in violation of Section 2 of the Sherman Act (15 USCA § 2).

Two important Fifth Circuit decisions enumerate the various elements of antitrust violations. They are North Texas Producers Ass. v. Young, 308 F.2d 235 (5th Cir. 1962) and Woods Exploration & Pro.Co. v. Aluminun Co. of America, 438 F.2d 1286 (5th Cir. 1971). Both deal with the fundamental issues involved in this case; i.e., the use of market position through combination to exclude a competitor from a market.

In North Texas, supra, The Court notes:

> "The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones . . . . United States v. Tarpon Springs Sponge Exchange, 5th Cir., 142 F.2d 125."

In Woods Exploration, supra, the Court notes:

> "Nevertheless, prior cases have amply demonstrated that conduct designed to barricade access to markets . . . can constitute a proscribed means of monopolization."
>
> . . .
>
> "More important, we do not think that absolute success in excluding competition is an essential

> element to proving monopoly power under Section 2. It is enough that defendants' market position is such that they have substantial power to thwart competition."

It is clear on the record that the defendant has combined with many of the bottlers of Coca-Cola. The combination element both for Section 1 and 2 is established. The remaining question under the charge of combination to monopolize is whether the 86% held by Coca-Cola with its bottlers was intentionally achieved. The North Texas case answers the question:

> "Thus it follows that if monopoly power has been achieved through combination or conspiracy, Section 2 has been violated without further proof. "Intent and purpose to exercise that power" is established by proof of the fact of combination or conspiracy. As a practical matter, it is foolish to combine or conspire without an intent to make use of power resulting therefrom. To hold otherwise would be ridiculous, naive, and impractical."

The power to be exercised is the power to exclude competition. American Tobacco v. United States, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946).

The move by the defendant to exclude all competition for the distribution of lithiated lemon lime soft drink products through the bottlers of Coca-Cola was classic (and undisputed) in design. Where Alcoa in United States v. Aluminum Co. of America, 148 F.2d 416 (1945) anticipated competition and stopped it, Coca-Cola was faced with established competition and eliminated it.

> "It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret "exclusion' as limited to manouvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusianary'. So to limit it would in our judgment, emasculate the Act; would permit

> just such consolidations as it was designed to prevent." (emphasis added).

As the undisputed facts on Exhibit A show, Coca-Cola induced bottlers to combine by, among other things, offering an additional 40¢ per gallon expressly conditioned on combination. (See the facts in Fortner Enterprise v. U. S. Steel Corp. supra,) This is far more substantial than U. S. v. Hamilton Mfg., 1960 Trade Cases Paragraph 69,882 where a manufacturer and its distributors were prohibited from adhering to an understanding that the distributors would refuse to buy from a competitor of the manufacturer. Or, even more analogous, Richfield Oil Co. v. Karseal Corp., 221 F.2d 358 (9th Cir. 1955) where the defendant combined with its dealers to exclude competitive automobile accessories. In this case the combination was organized by Coca-Cola on an invitation and acceptance basis. As the Supreme Court said in Interstate Circuit v. United States, 59 S. Ct. 467 (1939):

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that co-operation was essential to successful operation of the plan.
>
> . . .
>
> Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce is sufficient to establish an unlawful conspiracy under the Sherman Act."

The Interstate Circuit case was a circumstantial evidence case. The only inference needed was whether each member of the combination had knowledge of the others participation.

> "It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance." p/ 473.

In the case at bar it has been admitted that agreement to participate in the combination was secured before Coca-Cola would grant the extra allowances.

These combinations throughout the country were unlawful. U. S. v. Hamilton, supra; Klor's v. Broadway--Hale Stores, 3 L. Ed. 2d 741 (1959); Radiant Burners v. Peoples Gas Light & Coke Co., 5 L. Ed. 2d 358 (1961); Associated Press v. U. S., 89 L. Ed. 2013 (1945). That they achieved their intended result of 85% penetration in five years is established fact, though Mr. Law admitted that their additional 2 year free advertising "missed the big ones" - Los Angeles, San Diego, and Minneapolis-St. Paul, all big Bubble-Up accounts whose loss would have totally eliminated Bubble-Up.

Many other acts, themselves unlawful, contributed to Coca-Cola's successful building of a monopoly of the distribution system of the bottlers of Coca-Cola. These are, inter alia, the territory restrictions. It is established that the territories were and are the product of the bottlers, not Coca-Cola, and therefore illegal per se under White Motor Co. v. United States, 9 L. Ed. 2nd 738 (1963) and the cases cited therein. The equipment lending program is a classic antitrust violation. IBM v. U. S., 80 L. Ed. 1085 (1936); International Salt Co. v. United States, 92 L. Ed. 55 (1947).

Even though there were other obvious anti-competitive acts and conduct (especially the initial 3 year losses in the face of additions of one bottler a day for the first 400 days as well as a higher priced product - which raises the clear inference that Coca-Cola bought the market), the undisputed facts compel a directed verdict in favor of the plaintiffs.

II.
Exclusion of Defense Evidence

1. The plaintiffs object to any evidence regarding the availability of other bottlers in addition to Coca-Cola bottlers. Karseal v. Richfield Oil Co., 221 F.2d 358 (9th Cir. 1955); Woods Exploration & Pro. Co. v. Aluminum Co. of America, supra. In Karseal the plaintiff was a manufacturer of car wax. Richfield used coercion and inducements with the Richfield branded gasoline station not to buy competitive automobile accessories not coming from Richfield. Karseal was boycotted from all Richfield stations. The product, although it achieved some penetration, was eventually almost totally eliminated from the independent Richfield service stations. It was obviously no defense for Richfield to argue that Karseal was free to market its product in the many other branded independent service stations. Karseal had the right to compete on the merits for the independent Richfield service stations. Richfield did not have an exclusive right to the independent Richfield stations for allied automotive products the same as Coca-Cola has no exclusive right to the independent Coca-Cola bottlers for allied soft dring products. Therefore, the "arena of competition", see Woods Exploration, supra, must be limited to the independent bottlers of Coca-Cloa; and any evidence that Bubble Up could have gone elsewhere after it was eliminated from the independent Coca-Cola bottler market is totally irrelevant and would do nothing but prolong the trial. (Also see defendant's memorandum, at page 2, in

in opposition to plaintiffs' September Motion to Compel Discovery wherein the defendant concedes the "battle ground" to be the competition between Bubble-Up and Sprite for the independent Coca-Cola bottlers.)

2. The plaintiffs object to any evidence regarding their internal operations unless it can be shown by evidence aluinde that (a) a Coca-Cola bottler knew of such internal Bubble-Up operations and (b) assigned that as a reason for its refusal to deal with the plaintiff. Without such a showing, the evidence would be irrelevant and immaterial. In a major Supreme Court case described by the defendant as "one of those old Supreme Court cases", Eastman Kodak Co. v. Southern Photo Materials Co., 71 L. Ed. 684 (1927) the Supreme Court stated:

> "On the question whether the defendant's refusal to sell its goods to the plaintiff at dealers' discounts was in furtherance of a purpose to monopolize and constituted an actionable wrong, the defendant contends not only that there was no direct evidence as to the purpose of such refusal overcoming the presumption that it was a lawful one, but that such refusal was justified by the fact that the plaintiff had previously undertaken to handle the goods of another manufacturer under a preferential contract. Aside from the plaintiff's contention that this contract related merely to goods that did not conflict with the sale of those which it had been purchasing from the defendant, it was not shown that the defendant knew of this contract when it refused to sell its goods to the plaintiff. And for this reason, if for no other, we think that the trial court rightly declined to charge the jury to the effect that taking over of other goods by the plaintiff in itself justified the defendant in its refusal to sell to the plaintiff."

3. The plaintiffs object to any evidence of the profit and loss of the plaintiffs with its bottlers that it maintained. Plaintiffs'damages only concern those bottlers which were lost by Bubble-Up and the reasonable expectation of those Coca-Cola bottlers who would have bottled Bubble-Up in absence of the defendant's violations. Thus the only damage claim by the plaintiffs is lost profits and loss in value of the business calculated solely on lost sales of lost Coca-Cola bottlers. It makes no difference that the plaintiffs operated with its present bottlers at a loss or profit. The only question is how much more would have been made on sales to lost or foreclosed bottlers of Coca-Cola. If the jury finds that the plaintiffs lost profits and value on lost bottlers because of the defendant's violations, the inquiry stops

there. In the Supreme Court's decision in Chattanooga Foundry v. City of Atlanta, 51 L. Ed. 241 (1906) the Supreme Court quite early announced the principle that a man's total wealth is not in issue on damages in antitrust actions, but only that portion to which the antitrust violation made the man poorer.

> "But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there."

This antitrust principle has been consistently observed by the Supreme Court, and has been come to be known as the denial of the passing on defense as a defense to antitrust violations. Hanover Shoe v. United Shoe Machinery, 392 U. S. 481, 88 S. Ct. 2224 (1968). Thus, the plaintiffs' profit or loss on its bottlers that it was able to keep is irrelevant; the only inquiry is how much more the plaintiffs would have made and how much more the value would have been with the lost bottlers reconstituted, Albrecht v. Herald Co., 1971 Trade Cases Paragraph 73, 754; and the reasonable expectation of additional bottlers of Coca-Cola, Cherokee Lab. v. Rotary, 383 F.2d 97 (5th Cir. 1967); Straus v. Victor Talking Machine, 297 F. 791 (1924); Richfield Oil Corp. v. Karseal Corp., after trial, 271 F.2d 709 (1959); Zenith Radio Corp. v. Hazeltine, 395 U. S. 100, 89 S. Ct. 1562 (1969); Woods Exploration & Pro. Co. v. Aluminum, supra; North Texas Producers Assn. v. Metyger, supra.

4. The plaintiffs object to any evidence regarding the affairs of the company under Mr. Key as irrelevant, highly prejudicial, and immaterial. Practically all the lost Coca-Cola bottlers were before 1967. Those bottlers lost after 1967 never gave as reasons for their refusal to deal any of the bad publicity generated by Mr. Key in 1970. There is no possible causal connection between the refusals to deal and Mr. Key, and the effort to offer evidence on this subject is designed simply to show that at least in 1970 the murder victim deserved to be murdered.

5. The plaintiffs object and move to strike all evidence regarding what the plaintiffs may or may not have done with the glass of other competitors as being irrelevant, immaterial, and prejudicial. Perma Life Mufflers v. International Parts Corp., 88 S. Ct. 1981 (1968).

CONCLUSION

For the reasons and authorities given, plaintiffs respectfully move the Court to grant the plaintiffs' motions.

Respectfully submitted,

Joseph M. Alioto

Joseph M. Alioto

JMA/sem

cc. Delivered to Mrs. Gowen and Mrs. Peterson, Saturday, July 1, 1972. JMA.

II.

STATEMENT OF FACTS

The following facts, appearing in the record of this case, are set out in sequential order for the Court as follows:

1. Combination between Coca Cola Bottlers, with the consent of the defendant, to divide markets:
   a. Originally, under the 1899 contract;
   b. Subsequently, upon the introduction of Sprite in 1961.
2. Foreclosure to plaintiff of opportunity to reasonably negotiate the territory in which its product would be distributed by Coca Cola BottlerS.
3. New "Investment Market" territories organized by the defendant upon the introduction of Sprite in 1961.
4. Group Bottler meetings held by the defendant to explain the outline and function of the new territories:
   a. Combine the financial strength of the defendant and a group of Bottlers within a designated new territory to advertise, promote and merchandise the defendant's product Sprite on the consumer level (Bottlers within the territory would act as a "unit") while avoiding product and price competition amongst the Bottlers in the group.
   b. Employ the dominant position of Coca Cola in the cold bottle market to introduce Sprite in that segment of the consumer market and to arrive at three year anticipated gallonage figures for Sprite.

   c. Investment market (new territory) was premised upon fact of combination and was invoked by:
      1. decision made in Atlanta to have all the Company owned bottling subsidiaries introduce Sprite in April of 1961 (four of bottling subsidiaries are in the top twelve soft drink per capita areas of the United States)
      2. decision made to approach and attempt to franchise largest (key) Bottler in new "Investment Market" territories
      3. decision made to use television as primary advertising medium for introduction of Sprite in new territory
      4. decision made to make an additional 20¢ per anticipated gallon Sprite, projected over a three year period (available, when added to the contractual 25¢ per gallon on a 60¢ 1st year, 40¢ 2nd year, and 20¢ 3rd year basis), expressly conditioned upon a combination of Bottlers located within the new territory the effect of which would be roughly 80% consumer distribution within the new territory.

Bottlers introducing Sprite after the above-described combination was effected would not have the extra 20¢ per anticipated gallon of Sprite made available to them, and would have, absent the combination, 25¢ instead of 65¢ per anticipated gallon of Sprite for the first Introductory year.

5. Department of Bottler consolidations and mergers created in 1962.
6. Defendant sustains consistently increasing losses on Sprite under the Investment Marketing Program (1961-1963).
7. Defendant begins to appoint Bottlers as wholesalers of post-mix fountain syrup for Sprite and all products (1962)

7(a). Appointment of Bottler as wholesaler for all fountain syrup, i.e., Coca Cola, Sprite, TAB and Fanta conditioned upon having Sprite on sale in bottles (Dickson Aff.; McGuyer No. 9).

8. Defendant begins its Equipment Lending Program under which it placed free fountain dispensing equipment in retail outlets on a nationwide basis with the contractual provision that, with the exception of one optional spout, all the products of the Coca Cola Company must be sold through the equipment, including Coca Cola, Sprite, TAB and Fanta flavors.
9. Bottler combinations formed by Investment Market Program become "accepted" by Bottlers (1964).
10. 1964 Coca Cola Program offered to Bottlers by defendant which provided for a cash payment of 2-1/2¢ per increased (over 1963) gallon of Coca Cola Bottle or BX (pre-mix) syrup purchased by the Bottler such payment to be made upon the condition that the Bottler "aggresively market" Sprite.

10(a). (Total amount of cash bonus 18¢ Coca Cola, 2-1/2¢ Sprite, 2-1/2¢ TAB, 2-1/2¢ Fanta = 25-1/2¢ expressly conditioned on participation in Coca Cola Co-op)

11. Defendant replaces Investment Markets with Bottler combinations called "Co-ops" (1964).

12. Mergers and Consolidations of Bottlers continue within the territories designated by defendant.
13. 1964-1965 programs initiated under which Company would pay entire Sprite advertising cost (the Bottler would not pay his 50% normal share) for two years. Offer conditioned on:
    a. Placement of Sprite in 2/3 to a majority of the Coca Cola outlets;
    b. Participation in the following year's Bottlers' Co-op.
14. Monies or value made available to Coca Cola Bottlers for Sprite:
    1.) All Fanta money;
    2.) Sprite contract money 25¢;
    3.) Sprite Investment market money 20¢;
    4.) Coca Cola gallonage increase money;
    5.) Amounts spent by Fountain Sales Dept. in placing fountain dispensers for sale of Sprite syrup;
    6.) Value of advertising spent on Coca Cola with which Sprite was specifically identified;
    7.) Value of television and other media discounts given to Bottlers because of joint advertising;
    8.) Value of entire Coca Cola Bottler field force;
    9.) Value of Coca Cola Market research;
    10.) Value of Coca Cola management;
    11.) Value of Coca Cola Quality Control Dept.;
    12.) Value of Coca Cola Advertising Dept.

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It is indisputable on the record before this Court that the Coca Cola Bottlers are a unique distribution market and are considered as such by the soft drink industry generally. The testimony of Messrs. Richard Harvey, Ben Koch, Irvin Sulmeyer, Richard Ryan, to name a few of the witnesses who have testified to this point, has all been to the effect that the Coca Cola Bottlers, considered as a group for purposes of national distribution are without peer in the industry.

Further, the testimony of Carl Navarre demonstrates that businesses other than concentrate manufacturers who deal in the soft drink industry treat the Coca Cola Bottlers as a distinct market, e.g., the Navarre Corporation and Cavalier Corporation (both of which sell vending and other assorted equipment exclusively to Coca Cola Bottlers).

With respect to this "competitive arena" in which the defendant and plaintiff exerted themselves to gain national distribution for their respective lemon-lime products the following chronology is set forth:

- 1958-59 corporate decision by plaintiff to deal exclusively with Coca Cola Bottlers as a distribution market in an effort to obtain national distribution.

- 1960 activities of the defendant informing Coca Cola Bottlers of plaintiff's dealings with some Pepsi Cola Bottlers.

- Bubble Up franchises approximately 340 Coca Cola Bottlers.

  Renewed commitment by plaintiff to deal only with Coca Cola Bottlers as a distribution market.

- 1961 decision by Fanta Beverage Company to deal only with Coca Cola Bottlers as a distribution market.

- Plaintiff viewed, in 1961, as being most active competition for Coca Cola Bottlers as a distribution market.

- 1961 "goal" set by Fanta Beverage Company to achieve 80% national distribution through Coca Cola Bottlers in five years.

- 1961 "goal of 80% reached in 1965. (86% of Coca Cola Bottlers distribute Sprite: 1967).

- Plaintiff lost approximately 300 Coca Cola Bottlers.

(Attached and made a part of this Exhibit are certain portions of the testimony of Messers. Harvey and Stoddard.)

you note when you are tempted, and that is the Coca-Cola bottlers, are tempted to broaden your line beyond the products offered you by the company, ask yourself if you really are buying or if you are really being bought. By that I take it that you mean that anytime that any bottler might be tempted by his judgment that he ought to have another line, that is not a product of the Coca-Cola Company, you are askinghim to reflect on that just a minute before he makes such a decision?

A The average Coca-Cola bottler represents a bastion of financial strength to his community, and he has a different business --

Q Excuse me, a little louder, Mr. Harvey?

A The average Coca-Cola bottler represents a bastion of financial strength in his community. The average Coca-Cola bottler here has a different business

Richard Harvey

from most of his competitors. The average independent bottler has a tremendous business where he sales bottles through fountain dispensers, through pre-mix and post-mix dispensers. Generally, the average Coca-Cola bottler has more of an on-premise business than his competitors do. One of the first things that any bottler does in adding a new product is to put it in his cold drink market, to put it in vending machine, to put it in his on-premise sales. . . .

Q Among those different assets that you mentioned that a Coca-Cola bottler has, you mentioned name, you mentioned organizational ability, you mentioned the bottler's access to finance. What does that mean? I take it that these distinguish the Coca-Cola bottler from other bottlers?

A Yes, sir, they do.

Harvey 129
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Q All right.

Now, Mr. Harvey, did you in your speech which we have just gone over, either in substance or effect, intend to convey to the bottlers that it was the policy of The Coca-Cola Company to provide a steady stream of new products to fill volume or profit needs of bottlers, the flow of proven new products was to be an ongoing effort by Coca-Cola, USA to discourage others' attempts at courting Coca-Cola bottlers, was that your intention when you delivered that speech?

A I think the speech ought to be able to speak for itself, sir. It was carefully put together to try to be a clear communications document. . . .

Q And would it be correct that the policy of the company was to have a flow of new products in an on going effort to discourage others who might attempt to court Coca-Cola bottlers?

A The company has been engaged in developing and trying to develop additional new soft drink product since 1960, and it is an ongoing activity. (Emphasis Supplie

CALVIN C.
STODDARD

Q All right. Did you have any discussions with Mr. Dickson about the number of Coca-Cola bottlers who had Bubble Up?

A I assume we did; yes.

Q What did you talk about, in sum and substance, not word for word, but basically what did you talk about?

A About the fact that these bottlers were in Bubble Up.

Q Did you discuss with Mr. Dickson possible programs that could be instituted to change these

CALVIN C
STODDARD

bottlers from Bubble Up to a Coca-Cola product?

A We were selling Sprite.

Q Yes.

Did you discuss with Mr. Dickson a program or a plan to have these bottlers change from Bubble Up to Sprite?

A We tried to sell Sprite wherever we could.

Q I understand that, sir, but did you discuss with Mr. Dickson a plan or a program to convert these bottlers from Bubble Up to Sprite?

A If a bottler was not handling Sprite, we tried to sell him Sprite.

Q I understand, Mr. Stoddard, you did try to sell him on Sprite.

But my question is: Did you discuss with Mr. Dickson any plan or program to convert Coca-Cola bottlers from Bubble Up to Sprite?

A We had a plan to get bottlers into Sprite. It was the same regardless of whether they were --

THE COURT: He asked you a specific question. If you will answer that, and then you may explain. I believe the question was: Did you discuss with Mr. Dickson any specific plan to convert bottlers of Bubble Up to Sprite.

THE WITNESS: We tried to sell everyone that

THE COURT: That is not the answer. You may answer the question and explain your answer if you desire to do so. That was his question. Would you please answer that, first?

THE WITNESS: Yes.

BY MR. ALIOTO:

Q Yes, you did?

A Yes.

Q Did you request Mr. Dickson to send you the list of the different bottlers throughout the country who were bottling Bubble Up?

A Not to my knowledge, I didn't.

Q Did you use this document, Plaintiff's Exhibit 184 in evidence, in any discussion you had with Mr. Dickson about converting Bubble Up bottlers to Sprite?

A In correspondence I think so; yes.

Q Did you ever have any sit-down meetings with

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